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PRACTICE AND PROCEDURE IN MISSOURI*

JOHN S. DIVILBISS**

I. PLEADING

A. *Motion for More Definite Statement*

Rule 55.06 of the Missouri Rules of Civil Procedure requires that a petition contain "a short and plain statement of the facts showing that the pleader is entitled to relief"

After the 1943 Code of Civil Procedure was written, Judges Hyde and Douglas pointed out that the Missouri rule "requires a more definite statement of a claim than the corresponding Federal rule" and that a motion for a more definite statement should be granted to require a pleader "to clearly define the issues to be met." When issues are thus defined "a party is guided in his preparation for trial and may protect himself against surprise."¹

Both before and after the 1943 Code the Missouri courts have held that a plaintiff who alleges general negligence in other than a *res ipsa loquitur* case will be required to make his petition more definite if defendant so demands.²

In December 1960, the Kansas City Court of Appeals reaffirmed this principle saying:

It cannot be denied that a motion to make a petition more definite and certain should be sustained where the petition pleads general negligence, and the *res ipsa loquitur* doctrine does not apply.³

One month later division two of the Supreme Court cast some doubt on this proposition.

*This article contains a discussion of selected cases appearing in volumes 335-345, South Western Reporter, Second Series.

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1. 2 CARR, MISSOURI CIVIL PROCEDURE 549 (1947).

2. Zichler v. St. Louis Pub. Serv. Co., 332 Mo. 902, 59 S.W.2d 654 (1933); Allen v. St. Louis-S.F.R.R., 297 S.W.2d 483 (Mo. 1956).

3. Huchins v. Southview Golf Club, Inc., 343 S.W.2d 223, 224 (K.C. Ct. App. 1960).

In *Kornberg v. Getz Exterminators, Inc.*⁴ the plaintiffs hired defendant exterminators to ply their trade in plaintiffs' home. Plaintiffs' petition alleged that the defendant used "a certain alleged insecticide," the odor of which remained long after defendant's departure.

Plaintiffs also charged that defendant had "exclusive knowledge as to the cause of such vile, noxious odors"; that a "proper application" of the insecticide would have prevented the residual odors; and, further, that defendant had been "negligent and careless."

The exterminator, believing that a defendant is entitled to know what "issues" will be presented at the trial, moved for a more definite statement. The motion was granted by the trial court, but the Supreme Court held the petition definite enough as originally written.

The Supreme Court acknowledged that defendant made its motion to force plaintiffs to allege "with particularity what defendant had done or failed to do." The court excused plaintiff from this duty because "the effects of the insecticide used by defendant in treating plaintiffs' home, were peculiarly within the knowledge of the defendant, and were matters of which plaintiffs could not reasonably be expected to know. . . ."

Thus the petition was held adequate because it charged "general negligence with as much particularity as should be expected." (There was no suggestion that plaintiffs were proceeding on a *res ipsa* theory. If they had been, the case would have been easily resolved on that basis.)

The exterminator will now go to trial without knowing what act of negligence he is charged with or what the issues will be. Plaintiffs will be allowed to offer proof that defendant used too much insecticide, the wrong mixture, the right mixture but the wrong application or any other theory they choose. Defendant is not to be envied its job of preparing the defense.

Although plaintiffs have been excused at this stage of the litigation from specifying how defendant was negligent, their relief is probably temporary. Having sued on a theory of negligence, plaintiffs must certainly do more than prove that when defendant's work ended the redolence lingered on. The prolonged stench may have been unavoidable, or it may have been produced by some improvident act of the homeowner. Instructions to the jury must surely hypothesize some particular acts or omissions and they must require a finding that those acts or omissions amount to negligence.

4. 341 S.W.2d 819 (Mo. 1961).

It is respectfully suggested that since plaintiffs must formulate a theory of liability at some stage of the case, the proper place is in the petition. If they need more information, adequate time should be allowed for them to make full use of the discovery devices and to consult their own expert witnesses before requiring the more definite statement.

The court relied heavily on the broad dictum in *Maybach v. Falstaff Brewing Corp.*⁵ which also suggested that the particularity required of a plaintiff's petition should depend in part on the amount of information in plaintiff's possession at the time of filing suit. In neither case is there any suggestion as to the facts which must be hypothesized in the verdict directing instruction. The *Kornberg* and *Maybach* cases both acknowledge that negligence is the "ultimate fact" to be determined.

The jury can hardly pass on this question without knowing the particular acts or omissions under attack.

The *Kornberg* case is a departure from the previously announced principle requiring a pleader to "clearly define the issues to be met." The new doctrine is apt to be difficult to apply and unduly burdensome to defendants.⁶

B. Contributory Negligence

Illinois requires a plaintiff to plead and prove freedom from contributory negligence.⁷ This, of course, is contrary to the Missouri rule which requires defendant to plead and prove plaintiff's contributory negligence.⁸ When an Illinois cause of action is tried in Missouri, who has the burden of *proof* on the issue of contributory negligence? Who must *plead* the issue?

In 1957 the Missouri Supreme Court "re-examined" the law on the subject and held that when an Illinois cause of action is tried in Missouri, plaintiff has the burden of *proving* freedom from contributory negligence.⁹ The question of which party must *plead* the issue was not raised in that case. This problem arose in *Bean v. Ross Mfg. Co.*¹⁰

The plaintiff, a plumber, was injured when a drain solvent exploded.

5. 359 Mo. 446, 222 S.W.2d 87 (1949). This case was also noted in 16 Mo. L. Rev. 76 (1951), wherein it was suggested that the real effect of the decision was to broaden the *res ipsa* rule.

6. If comparative knowledge is to be the test in pleading, a sleeping passenger involved in an automobile wreck should likewise be permitted to invoke a charge of general negligence.

7. Cullen v. Higgins, 216 Ill. 78, 82, 74 N.E. 698, 700 (1905); Hanson v. Trust Co., 380 Ill. 194, 43 N.E.2d 931 (1942).

8. Mo. R. Crv. P. 55.10.

9. O'Leary v. Illinois Terminal R.R., 299 S.W.2d 873 (Mo. 1957) (en banc).

10. 344 S.W.2d 18 (Mo. 1961) (en banc).

Plaintiff sued the solvent manufacturer for negligence in not adequately warning plaintiff of dangers in using the solvent. The injury occurred in Illinois, but suit was filed in Missouri.

Plaintiff filed his petition before the 1957 "re-examination"¹¹ and failed to allege his own due care. Defendant, following the Missouri practice, raised the issue of contributory negligence as an affirmative defense in its answer. At the beginning of the trial "plaintiff asked leave to amend" (presumably to correct his petition by asserting his own due care). The trial judge denied the request, but he did permit plaintiff to file a reply in which plaintiff alleged due care for his own safety.

Defendant in its motion for a directed verdict and an appeal argued that plaintiff's petition failed to state a cause of action and that the elements essential to a cause of action may not be stated in the reply.¹² But plaintiff was saved because defendant's answer injected the issue, and the court held that "this cures the omission . . . at least when the reply joins in the issue. . . ."¹³

Did the defendant make a tactical error in supplying the contributory negligence issue in his answer? The court so implies. Federal decisions dealing with the same problem offered little guidance to counsel because of the divergence of views expressed.¹⁴

11. O'Leary v. Illinois Terminal R.R., *supra* note 9.

12. In *Kent v. City of Trenton*, 48 S.W.2d 571, 575 (K.C. Ct. App. 1931), the court said: "Plaintiffs must recover, if at all, upon the cause of action stated in the petition, and, if none is stated, a reply cannot aid the petition." See also *Moss v. Fitch*, 212 Mo. 484, 502, 111 S.W. 475, 479 (1908); *Talbert v. Chicago, R.I. & P. Ry.*, 314 Mo. 352, 365, 284 S.W. 499, 502 (1926) (en banc); *Dreckshage v. Dreckshage*, 352 Mo. 78, 176 S.W.2d 7 (1943).

13. See *Conrad v. Allis-Chalmers Mfg. Co.*, 228 Mo. App. 817, 73 S.W.2d 438 (K.C. Ct. App. 1934), and *State ex rel. Fidelity & Deposit Co. v. Allen*, 85 S.W.2d 455, 461 (Mo. 1935).

14. Federal Rule 8(c) also makes contributory negligence an affirmative defense. The problem has arisen in federal diversity of citizenship cases which were tried in states, such as Illinois, where plaintiffs must plead and prove freedom from contributory negligence. Under the doctrine of *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), federal courts are required to follow the substantive law of the state in which they are sitting. Burden of proof on the contributory negligence issue was held in *Sampson v. Channell*, 110 F.2d 754 (1st Cir. 1940), to be a matter of substantive law. As to who must *plead* the issue, the federal decisions have not been consistent. In *Francis v. Humphrey*, 25 F. Supp. 1 (E.D. Ill. 1938), the court held that plaintiff had the burden of pleading freedom from contributory negligence. There is dictum in *Sampson v. Channell*, *supra*, that Rule 8(c) requires defendant to plead the issue of contributory negligence even though plaintiff has the burden of proof as a matter of substantive law. In *Palmer v. Hoffman*, 318 U.S. 109, 117 (1943), the United States Supreme Court did little to clarify the area when it said: "Rule 8(c) covers only the manner of *pleading*. The question of the *burden of establishing* contributory negligence is a question of local law. . . ." (Emphasis

When cases of this kind are tried in Missouri courts a plaintiff should clearly allege due care for his own safety. Defendants who are served with petitions which omit this element will be greatly tempted to sit back and attack plaintiff's case at the close of his evidence.

C. Counterclaims

In *McClellan v. Sam Schwartz Pontiac, Inc.*¹⁵ the Supreme Court held that a counterclaim was not compulsory in an action begun in the magistrate court.

Schwartz sold an automobile to McClellan and accepted his note as part payment. McClellan defaulted and Schwartz filed suit in the magistrate court for the 519 dollar balance due on the note. McClellan counterclaimed to recover payments already made on the note, alleging that he was never able to get title to the car. Although he had made payments of 1,242 dollars, McClellan limited his counterclaim to 1,000 dollars so as to stay within the magistrate's jurisdiction.

The magistrate court found for McClellan on Schwartz's claim and for Schwartz on McClellan's counterclaim. Schwartz then appealed and the whole action was transferred to the circuit court.¹⁶ McClellan promptly dismissed his counterclaim without prejudice and filed a separate suit in the circuit court requesting not only the full 1,242 dollars paid on the note, but also 25,000 dollars in punitive damages. This move was necessary because when a magistrate action is appealed, the circuit court must hear the same case which was presented to the magistrate.¹⁷ This would have limited McClellan's counterclaim to 1,000 dollars. Since McClellan was faced with a circuit court suit, there was no longer any reason for limiting his prayer for damages.

This turn of events induced Schwartz to move for a dismissal of McClellan's new lawsuit (complete with prayer for punitive damages) on the ground that the same issues were being litigated in the case appealed from the magistrate court. Schwartz also argued that McClellan was splitting his cause of action by using it as a defense in the appealed case and as

added.) MOORE, FEDERAL PRACTICE ¶ 8.27, at 1692 (2d ed. 1948), suggests that in the federal courts the safest practice is for defendant to plead the issue of contributory negligence even though plaintiff must prove it as a matter of substantive law.

15. 338 S.W.2d 49 (Mo. 1960).

16. § 512.250, RSMo 1959.

17. § 512.280, RSMo 1959.

the basis for an independent action. The Supreme Court rejected both arguments and permitted the independent action to continue.¹⁸

With most dockets crowded it is unfortunate to have two independent trials involving the same transaction and issues. Had McClellan filed his 26,242 dollar counterclaim in the magistrate court within twenty days after the return date, the whole case would have been sent to the circuit court for the initial trial.¹⁹

Where an appeal from the magistrate action can reasonably be anticipated, a counterclaiming lawyer will save some duplication of effort by following this course.

II. PROCESS

A. Garnishments

Garnishments are common occurrences for most large corporations. Because objections are rarely raised, creditors, garnishees, and serving officers treat garnishments rather casually, and specific statutory directions are often ignored. This has its perils.

In *Blackburn Motor Co. v. Benjamin Motor Co.*²⁰ plaintiff began an attachment action against a nonresident defendant. In aid of attachment, a writ of garnishment was issued and served on Ford Motor Company as garnishee.

Section 525.050 of the Revised Statutes of Missouri (1959) requires that notice of garnishment shall be served on corporations by delivering notice to "the president, secretary, treasurer, cashier or other chief or managing officer of such corporation."

For many years it had been the custom of the sheriff and his deputies to serve garnishment writs by leaving them with the personal secretary of the Plant Comptroller of Ford Motor Company. This secretary had no supervisory duties and was in no sense a "managing officer" of Ford. There

18. Section 517.240, RSMo 1959, provides that a defendant "may set off any demand he has against the plaintiff" but it further provides that if the set off or counterclaim is for an amount in excess of the magistrate's jurisdiction, it shall be dismissed without prejudice. If such an excessive counterclaim is filed within twenty days after the return date of the summons, instead of dismissing the counterclaim, the magistrate is to certify the record to the appropriate circuit court. In *McClellan* the court said: "Those provisions indicate that the filing of such a counterclaim in the magistrate court is not compulsory and that the claim may be filed in another court is not compulsory and that the claim may be filed in another court having jurisdiction thereof." *McClellan v. Sam Schwartz Pontiac, Inc.*, *supra* note 15, at 53.

19. § 517.240(2), RSMo 1959.

20. 340 S.W.2d 155 (St. L. Ct. App. 1960).

was testimony that Ford never objected to this procedure and in fact made a practice of responding to such actions as though service had been made on a proper corporate official.

In the *Blackburn* case the same custom was followed and the deputy's return recited that the writ was served on the "secretary to the plant comptroller."

Although Ford had "never raised any question in the past about the manner of service of writs of garnishment" an objection was raised in the case by filing a motion to quash the writ of garnishment.

Plaintiff protested that Ford was now estopped to demand service on a proper corporate official and that Ford was guilty of laches. Neither argument was accepted.

The court held that the statute specifies which corporate officials may be served. The statute must be followed and "no voluntary act of the garnishee, not in strict compliance with the requirements of the statutes, can constitute a waiver of the statutory prerequisites."

The doctrine is not new,²¹ but it is a timely reminder that serving officers must penetrate the executive suite and reach one of the officials designated by the statute.

Attaching creditors are not the only ones who need to watch for full compliance with the statute. Garnishees who make payment when they are not properly summoned expose themselves to double liability. Payment in a garnishment action is a discharge of the garnishee's duty to his creditor only if the judgment against the garnishee is valid. If service is not on the proper corporate official, the court does not obtain jurisdiction and the judgment is void.²²

21. *C. Rallo Contracting Co. v. Blong*, 313 S.W.2d 734 (St. L. Ct. App. 1958). There the garnishment notice was served on a bookkeeper who was called a "chief clerk" in the sheriff's return. Such service was held inadequate to give the court jurisdiction over the debt sought to be attached.

22. *Hedrix v. Chicago, R.I. & P. Ry. Co.*, 103 Mo. App. 40, 43, 77 S.W. 495, 496 (St. L. Ct. App. 1903), expresses the rule as follows: "It devolved upon the garnishee, not merely as the exercise of a right, but also as a duty, and in self-protection, to make the defense that the judgment upon which the writ of garnishment was based was void for want of jurisdiction. If the court rendering the original judgment had attempted to exercise jurisdiction without any legal foundation, the whole proceeding was void, and no property or credits of defendant could be divested through it; and a garnishee voluntarily submitting to judgment for any amount in his hands belonging to defendant, without interposing the defense of absence of jurisdiction, would neither be protected in the subsequent payment of such judgment, nor discharged from the indebtedness as against defendant, who could be deprived of his property only by due process of law."

B. *Actions Against Decedents' Estates*

The need for a literal compliance with notice statutes was also demonstrated in *Smith v. Maynard*.²³

Plaintiff sustained injuries while riding as a guest passenger in an automobile operated by decedent. The accident happened on April 30, 1956. On June 14, 1956, the Probate Court of Warren County, on plaintiff's application, appointed an administratrix for decedent. The first publication of the granting of letters was made on July 5, 1956.

Plaintiff filed suit against the administratrix in the Circuit Court of Warren County on November 19, 1956, or about seven months after the accident. The administratrix filed an answer to the petition which was in effect a general denial.

On December 13, 1957, the administratrix delivered the *coup de grace*. She moved to dismiss plaintiff's petition because plaintiff had not filed a copy of her petition and service of process with the Warren County Probate Court "within nine months after the first published notice of letters testamentary or of administration" as required by statute.²⁴

Plaintiff claimed waiver and estoppel because the point was not raised when the first responsive pleading was due and because defendant moved for a change of venue and took depositions in the action.²⁵

The majority opinion held that the plaintiff's claim was completely barred for failure to comply with the statutory filing requirements. The dissenting opinion would have permitted plaintiff's case to proceed so long as she did not attempt to reach assets of decedent's estate. Since decedent had a liability policy equal to plaintiff's prayer for damages, this would have permitted plaintiff to recover without touching the decedent's assets or interfering with the prompt administration of the estate.

III. ARGUMENT

Few pains known to man equal that suffered by a defense attorney during the plaintiff's final (and unanswerable) argument. The agony

23. 339 S.W.2d 737 (Mo. 1960) (en banc).

24. § 473.360, RSMo 1959, as amended in 1959 by S.B. 305.

25. The same general problem was raised in *Clarke v. Organ*, 329 S.W.2d 670 (Mo. 1959) (en banc). Plaintiff Smith tried to distinguish her case by arguing that a 1959 amendment to Section 473.060, RSMo 1959, evinced a legislative intent that claims not properly filed would only be barred from recovering out of the estate. Plaintiff argued that she did not want to make her recovery "out of any assets being administered," but rather from the decedent's liability insurance policy which was not an asset of the estate. Her arguments were obviously unsuccessful.

reaches its peak when plaintiff's counsel raises new matters which could be answered by defendant except for plaintiff having the last word. To these sufferers, relief is in sight.

The *Canons of Ethics*²⁶ provide in part:

It is not candid or fair for the lawyer . . . in these jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to re[p]ly.²⁷

One of the earliest comments on the proper scope of the plaintiff's final argument came in 1922.²⁸ Plaintiff and defendant had each been allotted twenty minutes for their arguments and plaintiff had used twelve minutes for the first part of his argument. Defendant then waived closing. The trial court ruled that this brought the case to a close and plaintiff lost his remaining argument time.

The Supreme Court held that the trial judge had not abused his discretion and commented that:

[T]he purpose of a concluding argument is to *answer the argument* by counsel who holds the negative in a given case, and if, perchance, defendant's counsel declines to argue and waives argument, plaintiff for the affirmative has nothing to answer. (Emphasis added.)²⁹

A somewhat different approach came in a 1940 case.³⁰ Plaintiff had sued a hotel owner for injuries received from a fall due to defendant's failure to provide adequate light in the bathroom. Certain pictures of the bathroom were used in the trial but not mentioned in the first part of plaintiff's closing argument. Defense counsel objected to the final argument being based on these pictures.

The court referred to what is now Rule 4.22 of the *Canons of Ethics* and said: "The rule both ethical and procedural is that counsel must not conceal or withhold 'positions' in his opening argument." The court then concluded that plaintiff had not concealed a "position" for defendant knew plaintiff's position to be that the bathroom area was dim and the floor mark-

26. Mo. SUP. CT. RULE 4.22.

27. In a footnote to *Votrain v. Illinois Terminal R.R.*, 268 S.W.2d 838, 845 (Mo. 1954) (en banc), the court said: "The last word is 'rely' in the rule as adopted November 1, 1934. . . . However, in subsequent pamphlets . . . the word erroneously appears as 'reply.'"

28. *Friedman v. United Rys.*, 293 Mo. 235, 238 S.W. 1074 (1922).

29. *Id.* at 247, 238 S.W. at 1077.

30. *Cumming v. Allied Hotel Corp.*, 144 S.W.2d 177 (St. L. Ct. App. 1940).

ings deceptive. The court said: "This was the position taken in the opening argument and the closing argument."

The term "position" was given a very broad meaning somewhat akin to a theory of recovery. Such a test is apt to be an inadequate standard.

The problem was raised again in 1954.³¹ Plaintiff's counsel ended the first half of his argument by saying that he would like to develop "how we are going to compensate a man for these lifetime injuries." Defense counsel then made his closing argument. When plaintiff's counsel commenced the final portion of his argument he began discussing the nature, extent and permanency of plaintiff's injuries and requested \$85,000.

Defense counsel objected because there had "been no mention of the amount in the first half of counsel's argument" and the defense had no opportunity to rebut it. Defendant also asked for a mistrial.

The trial judge instructed the jury to "disregard that particular statement as to the amount" but the request for the mistrial was denied.

On appeal the Supreme Court specifically ruled that Canon 4.22 had not been violated. The court did say that: "Generally, the purpose of closing argument by [plaintiff] is to answer the argument of counsel for [defendant] By custom and better practice, closing arguments should be in rebuttal." The court also said: "We shall assume without deciding that the trial judge correctly sustained defendant's objections." This comment considerably diluted whatever force the opinion might otherwise have had.

Seven years later the same defense counsel raised the same point but with greater success. In *Shaw v. Terminal R.R. Ass'n*³² plaintiff's counsel confined the first part of his closing argument to the issue of liability and credibility of witnesses. "He did not, as such, mention the matter of plaintiff's injuries or the damages claimed." At the close of the first part of his argument plaintiff's counsel said that in his concluding (and unanswerable) argument he had "some other points" that he wanted to develop.

Defense counsel then served notice on plaintiff's counsel before he stopped the first part of his argument that if he "expects to raise any new points in his final argument," defendant would object. Defense counsel added: "If he [plaintiff's counsel] has any damages to argue or anything else, I would like to have the opportunity to answer them." The trial judge said simply, "Overruled."

To the surprise of no one, the plaintiff's counsel in his concluding argu-

31. *Votrain v. Illinois Terminal R.R.*, *supra* note 27.

32. 344 S.W.2d 32 (Mo. 1961).

ment "spent a considerable part of his time in arguing the matter of injuries and damages." Defense counsel objected and was overruled.

The Supreme Court held that the trial court erred in allowing closing argument on injuries and damages and reversed the plaintiff's 20,000 dollar judgment.

The court refused to "lay down a hard and fast rule governing all cases, in all their varying circumstances," but the court did say that "the party having the affirmative of the issues in a suit such as this may not, after full notice and warning, withhold all arguments on the vital questions of injuries and damages."

This is a more precise and more workable limitation than trying to determine whether plaintiff has concealed his "position."

Two earlier cases were discussed and distinguished.³³ In neither case did defense counsel give the "full and complete warning" given in this case.

Defense lawyers wishing to avail themselves of the protection conferred by this case should furnish plaintiffs with the same full and complete warning before beginning their own closing arguments, and they should be careful to object to any violations. They must also avoid waiving their right to impose this limitation. The court suggested that had defense counsel touched on the question of damages or injuries in his own argument, the door would have been open for plaintiff to argue these matters in *answer* to the defendant.³⁴

IV. APPEALS

*Joffe v. Beatrice Foods Co.*³⁵ dealt with a question of appellate jurisdiction, but its real significance is the effect it has on the amount of plaintiffs' ultimate recovery.

Plaintiff, a passenger in an automobile, was injured in a collision in-

33. *Goldstein v. Fendelman*, 336 S.W.2d 661 (Mo. 1960); *Votrain v. Illinois Terminal R.R.*, *supra* note 27.

34. Within a few months after the *Shaw* case the waiver problem did arise. In *Sullivan v. Hanley*, 347 S.W.2d 710 (Spr. Ct. App. 1961), plaintiff ignored the damage issue in the first part of his argument. Defendant in his argument "did refer briefly to the testimony that plaintiff's doctor, Gemstetter, stated he saw plaintiff only a total of thirteen times from the time plaintiff left the hospital." The court said: "The facts inherent in this case distinguish it from the *Shaw* case. In view of defendant's counsel having made some mention of the medical situation, the trial judge technically was correct in his refusal to sustain a general objection to 'any argument about any injuries.'"

The court also noticed the absence of the advance "warning" given by defendant in the *Shaw* case.

35. 335 S.W.2d 34 (Mo. 1960).

volving four different vehicles. Plaintiff and his parents filed a 30,000 dollar suit against the drivers of three of the vehicles and the corporate owner of the fourth. The four defendants were charged with being joint tortfeasors.

At the close of plaintiffs' evidence the trial judge directed a verdict in favor of three of the four defendants. The jury returned a 9,500 dollar verdict against the remaining defendant. It may be assumed that the losing defendant had a small liability insurance policy as 5,025 dollars was promptly paid on the judgment. This reduced the judgment debt to 4,475 dollars.

Plaintiffs filed a motion for a new trial complaining that the trial court had erred in directing verdicts for certain defendants. Plaintiffs did *not* complain about the adequacy of the award. After the motion was overruled plaintiffs appealed to the Supreme Court on the theory that more than 15,000 dollars was in dispute as the escaping defendants had been sued for 30,000 dollars. The Supreme Court disagreed and ordered the case transferred to the Kansas City Court of Appeals because only 4,475 dollars was in dispute.

The Supreme Court held that plaintiffs' damages had been assessed by the jury and when no exception was taken concerning the adequacy of their award, the amount became final, not only as to the losing defendant, but as to the other three defendants who got out at the close of plaintiffs' case. So if plaintiffs ultimately get a new trial against the remaining defendants, their maximum recovery will be 4,475 dollars and not the 30,000 dollars prayed for.

Plaintiffs argued, first, that the damages awarded against one defendant should have no limiting effect on their recovery against other defendants for whom verdicts were directed before the case went to the jury; second, that dismissing three of the defendants from the case at the close of plaintiffs' evidence converted the case from one joint action to four separate actions.

The court rejected both arguments and held that plaintiffs' failure to complain about the adequacy of the jury award in their new trial motion amounted to an acceptance that "their total recovery, irrespective of the number of defendants finally liable was in the sum of \$9,500."

There is a certain appeal to plaintiffs' argument that the defendants who were dismissed at the close of plaintiffs' evidence should not enjoy the benefits of the low verdict. And plaintiffs can rather logically argue that there was no point in complaining about the adequacy of an award rendered against one unable to pay even the inadequate sum assessed.

Appealing as these arguments may seem, they run counter to the principle that when a plaintiff brings one action against two or more joint tortfeasors, "there must be only one final judgment in the same amount against all who are held liable."³⁶ All of the defendants remained in the case until plaintiffs had completed their proof. Each defendant had an opportunity to cross-examine plaintiffs' witnesses in an effort to reduce the amount of recovery. Such defendants receive the benefits and burdens of the jury's assessment.

Even if the plaintiffs had proceeded separately against one of the joint tortfeasors, an appeal from the inadequate award might have been necessary. A judgment, adequate or inadequate, against one of several joint tortfeasors will, *if satisfied*,³⁷ discharge the remaining tortfeasors.

The universal rule at common law is that when an injured party has received full satisfaction for his injury, from one wrongdoer, whether the injury was caused by one or more, each of whom may be severally liable, he is barred from further recovery from the other tortfeasors.³⁸

36. *Yarrington v. Lininger*, 327 S.W.2d 104, 111 (Mo. 1959).

37. There is some difference of opinion as to whether a plaintiff must accept satisfaction of a final judgment thus preventing subsequent suits against the other tortfeasors. In *Skelly Oil Co. v. Jordan*, 186 Okla. 130, 96 P.2d 524 (1939), and in *Bradford v. Carson*, 223 Ala. 594, 137 So. 426 (1931), the plaintiff was permitted to reject satisfaction of a small judgment obtained against one tortfeasor so as to proceed against another joint tortfeasor with the hope of a more adequate award. A contrary result was reached in *Collins v. Smith*, 255 App. Div. 665, 8 N.Y.S.2d 794 (1939), where the court held that when the losing defendant paid the amount of the judgment into court such was sufficient to constitute a satisfaction which would bar suit against another joint tortfeasor. For a discussion of this subject and the related problem of suing out execution against one of several tortfeasors see Annot., 166 A.L.R. 1099 (1947).

38. *Hanson v. Norton*, 340 Mo. 1012, 1022, 103 S.W.2d 1, 6 (1937).